UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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CARLOS COLLAZOS,

Plaintiff,

versus 21 CV 2095 (PKC)

GARDA CL ATLANTIC, INC.,

Defendant.

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U.S. Courthouse
Brooklyn, New York

November 10, 2021
11:00 a.m.

Transcript of Civil Cause for Premotion Conference

Before: HONORABLE PAMELA K. CHEN,

District Court Judge

APPEARANCES

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(Via videoconference.)

THE COURT: Good morning, everybody.

MR. FORREST: Good morning, Your Honor.

MR. MOSER: Good morning, Your Honor.

THE CLERK: Civil cause for premotion conference, Docket 21 CV 2095, Collazos versus Garda CL Atlantic, Inc.

Before asking the parties to state their appearances, I would like to note the following: Persons granted remote access to proceedings are reminded of the general prohibition against photographing, recording, and rebroadcasting of court proceedings. Violation of these prohibitions may result in sanctions, including removal of court-issued media credentials, restricted entry to future hearings, denial of entry to future hearings, or any other sanctions deemed necessary by the Court.

Will the parties please state their appearances for the record, starting with the plaintiff.

MR. MOSER: Steven Moser, for the plaintiff.

THE COURT: Good morning.

MR. MOSER: Good morning.

MR. FORREST: Good morning, Your Honor. Loren Forrest, for the Garda entities.

THE COURT: Good morning to you as well. That's Mr. Forrest, right?

MR. FORREST: Yes.

THE COURT: Okay, good. All right.

So we are here on the request of defendant to file a motion to compel arbitration and then to stay these proceedings pending that arbitration. The parties have obviously outlined, or at least the defense has outlined the issues it intends to raise in its motion, and plaintiff has responded.

Obviously, the format is somewhat limited because my rules require that these be done in three-page submissions. So I understand that you may elaborate or even add points to the motion if it's filed.

What I wanted to do, though, was discuss what I think the issues are that should be addressed and perhaps first to raise one issue that wasn't discussed by either side but I want to see if there is agreement on it.

So I think there are three issues that have been raised by the parties' letters; and so the first of those issues is whether or not the plaintiff is -- I shouldn't say the first, but this is my prioritization of them. But the first is which CBA applies, the 2017 or the 2018. The second is whether or not the grievance and arbitration procedures described, substantially similarly in both of those agreements, are mandatory or permissive, and then the third issue would be what is the scope of this grievance and arbitration clauses and do they encompass the statutory

claims, the New York Labor Law claims that have been brought by plaintiff and the putative class.

The fourth issue -- and this is one, as I said before, to me is actually the priority issue or maybe the first issue and isn't addressed by the parties or raised. So maybe it's a nonissue from your perspective, and that is who decides arbitrability of these claims. So as the parties, I presume, are aware, there is a presumption that the Court or the judicial system decides the question of whether or not the issue is arbitrable and/or whether or not the arbitrator should decide -- it's hard to say -- arbitrability.

Do the parties agree that the Court should decide that issue? And let me start with the defense, since it's their motion. Mr. Moser?

MR. MOSER: The defense or the plaintiff, Your Honor?

THE COURT: The defense -- I'm sorry. Yes. You are Mr. Moser. You are for the plaintiff.

Mr. Forrest. I'm sorry.

MR. FORREST: No problem, Your Honor. Yeah, I think the defense would concede that the courts usually decide arbitrability in these matters.

THE COURT: Mr. Moser, any disagreement from you?

MR. MOSER: No, and I believe the rules of the FMCS state that they actually will not decide arbitrability, so.

THE COURT: Okay. That's fine then. So that's really a nonissue, and I'm glad to hear that.

Then, with respect to the different issues that are going to be briefed -- and, quite honestly, I do think briefing is necessary. I know, Mr. Forrest, you have suggested that maybe we could just or I could resolve them via this conference. I don't think I can, and I do want to give both sides a full opportunity to raise their issues, because I think they are somewhat complicated, and while I can look at the relevant provisions that have been pointed out, I do want to have a chance to or I do want to give both sides a chance to argue this since it's fairly significant motion that's being made and will obviously affect the trajectory of this case substantially.

So I have a few questions. Then I will open the floor, if you want to raise anything before we set a briefing schedule. The first question I have relates to which CBA applies.

When exactly did plaintiff terminate his employment or leave the company?

MR. MOSER: He left his employment in the summer. I believe it was August of 2018, prior to the effective date of the second CBA.

THE COURT: Okay. So the second CBA took effect on September 1, 2018, even though it was negotiated in, or signed

I guess, in July 2018.

Is that correct, Mr. Forrest?

MR. FORREST: Yes, that is correct. I think those dates are correct.

THE COURT: So there is no disagreement that the plaintiff was no longer working at the defendant's company -- or the defendant, I should say, Garda, G-A-R-D-A -- by the effective date of the 2018 CBA?

MR. FORREST: Yes, I believe that's correct.

Hold on. I just want to pull up the effective date. I would point out that the agreement was --

THE COURT: It was being negotiated while he was there, or it was executed while he was still there?

MR. FORREST: Yes, that's true. That's true. So it was executed, I believe, on July 23, 2018.

THE COURT: Right. But it took -- but its effective date was September 1, 2018?

MR. FORREST: Yes, it does say September 1, 2018. That's correct, Your Honor.

THE COURT: Okay. So there is no dispute that the plaintiff was no longer working at the company by the effective date of the 2018 CBA?

MR. FORREST: I believe that's correct, yes.

THE COURT: Okay. Obviously, both sides will argue about whether he is still bound by it, but I want to make sure

there wasn't any factual dispute since it's not part of the complaint itself or wasn't specified in the complaint.

Then the other question I have is whether the plaintiff agrees with the defendant's characterization about the amount in controversy, since obviously federal jurisdiction does depend on the threshold amount being met and defendant has set forth calculations indicating that it is exceeded.

So I want to know if the plaintiff agrees with that, not that you agree with the calculation; but, do you agree that there isn't an issue about jurisdiction, diversity jurisdiction, based on the jurisdictional amount?

MR. MOSER: I believe that we agree with the defendant that the jurisdictional threshold has been met.

THE COURT: So you are not disputing the removal of this case; is that correct, Mr. Moser?

MR. MOSER: That's correct.

THE COURT: Okay. Then, another question I have is: What effect -- and, obviously, this is strictly part of the dismissal motion -- the arbitration motion, but what would happen to the class action if I find that the 2018 CBA controls? And this is a question for you, Mr. Moser.

Wouldn't that have an effect on the class itself? In other words, wouldn't the class have to be limited to employees who left -- actually, let me take that back.

Well, it would eliminate the class. I guess if I decided that the 2018 CBA controlled, in theory, there could be no class action. Would you agree with that, Mr. Moser?

MR. MOSER: Yes, I would. I would suggest that it is probably an all-or-nothing scenario because the contract itself specifies the authority of the arbitrator. The first agreement does not limit the authority of the arbitrator to arbitrate classwide disputes, while the second one does.

THE COURT: Right. Okay. Then, conversely -- this is what I was thinking of originally -- if I decide the 2017 CBA controls, that would affect the class itself. It could be certified; is that correct, Mr. Moser?

MR. MOSER: That would be plaintiff's position, yes.

THE COURT: Okay. So it would have to be limited to employees who, like the plaintiff, left before the effective date of the 2018 CBA?

MR. MOSER: I don't believe it would have to be limited because to the extent that that arbitration clause is enforceable, it doesn't limit the scope of any class. It doesn't -- it just says that for the purposes of this arbitration there is no limit on the arbitrator's authority to decide it on a classwide basis.

MR. FORREST: May I respond to that, Your Honor?

THE COURT: Yes, please.

MR. FORREST: I think that's -- that would just be

fundamentally incorrect.

First of all, the 2018, the one with the class action, the limitations on class action is the controlling agreement; but if you were to find -- and we would severely disagree -- that the other, the earlier CBA controls, the class would be limited to only individuals such as the lead plaintiff, meaning such as Mr. Collazos, meaning that it would only be limited to people like him, who worked for us from before September of 2018 and left.

And I want to be clear that that's not consistent with collective bargaining negotiations. The union, in a collective bargaining agreement -- and I know you might be getting into this later and I might be skipping ahead -- it's a living, breathing document; and there is no question in this matter that Mr. Collazos did not bring his claim until this year, until 2021. So he is stuck with the 2018 agreement.

But if you were to find -- we would think incorrectly, respectfully -- that the earlier agreement applied, the class would be severely limited. It would change the class entirely. It would be, I would suspect, a much smaller class of people who worked for us at that time and left before the effectiveness of the other agreement.

THE COURT: You know, I missed part of that.

MR. FORREST: I don't think the union would agree with that, and I think there is case law in the Second

Department -- sorry -- Second Circuit that deals with this issue. There is a lot of collective and class action cases, and they are brought to the arbitration rules that are in effect at the time the plaintiff brings his or hers there.

THE COURT: Well, obviously, the plaintiff relies on the decision of my colleague Judge Brodie that was affirmed by the Second Circuit, although -- or I shouldn't say although -- which seems to address this question about the binding nature of a subsequent memorandum of agreement; and that case is -- I can't pronounce the plaintiff's name correctly, but it's Agarunova, A-G-A-R-U-N-O-V-A.

So you think Agarunova doesn't apply, is distinguishable, or just was wrongly decided?

MR. FORREST: I don't think that's the correct law, Your Honor, just to be clear.

CBAs are living, breathing documents, right, and the plaintiff at issue in our case, right, he is filing his arbitration -- he has filed a case in 2021 for alleged, you know, violations of law that occurred in 2016 to roughly like 2018, and there is only a statute of limitations of about six years there on statutory claims. So he would get claims back to 2015.

He chose to bring his claim now. He chose to bring his claim in 2021, after the union had negotiated another agreement; and I have looked at that case, but the union

wasn't party to that agreement. So, I'm sorry, I don't think the union weighed in on that case. I think they would have something different to say in that case, and I think the union at issue in this case would be a necessary party.

THE COURT: Go ahead.

MR. FORREST: All right.

THE COURT: I'm not sure I agree with that because the plaintiff was part of a union, which had a CBA with the defendant at the time of her employment. That was in 2014 or so. She brought her case in 2016. So obviously later and after she left the company.

It doesn't seem to me that Agarunova and any of the relevant cases stand for the proposition or address the proposition that or suggest that it's the timing of the lawsuit that matters as opposed to the timing of the employment and what CBA was in effect at the time; and I think Agarunova does stand for the proposition there that the plaintiff was not bound by the 2015 agreement that was negotiated after she left but rather she -- I'm sorry. Oh, I might have assumed something -- yes, I think that's right. Yes, I think that's right.

So she wasn't an employee in 2015, when there was a different agreement signed that would have required alternative dispute resolution, and that in 2014 there was no such agreement, only an agreement to try to agree later.

So I think that that is a legitimately cited case for the proposition that a later negotiated or executed agreement or CBA, such as the 2018 CBA, would not bind an employee who left before the effective date. So even to the extent that we are talking about -- we are really talking about class actions, of course, not this plaintiff, but that it wouldn't prevent similarly situated plaintiffs from joining a class and bringing this action.

MR. FORREST: One issue I want to address that's a little different in that case than ours is this: That in that case they were deciding whether it was arbitrable or not, right? The arbitration provisions in the 2018 and the earlier agreement are the same. There is no question that it's arbitrable. Okay.

So once you define that it's arbitrable, our position is, number one, it is arbitrable, because we speak about -- we don't have the defects of other cases. We speak about all the claims involving the work and we speak about claims under state, federal, or local law of any kind; and that's been adjudged by at least the Second Circuit to encompass New York Labor Law claims, statutory claims, wage-and-hour claims.

So, once you get to the fact that it's arbitrable, then the question is what's the jurisdiction of the arbitrator, right. The jurisdiction of the arbitrator here,

in our opinion, is different because now you have determined it's arbitrable and now the arbitrator has to follow the collective bargaining agreement that's currently in effect; and that's the difference, to me, that I would like to draw between those cases.

Finding it is not arbitrable at all is different than finding here that it is arbitrable and what are the terms of the arbitration, because the union and their lawyer have come up with this means, with this mechanism, right. So once the claims go to arbitration, then the arbitrator is bound by the collective bargaining agreement that is in effect now but not from certain years ago; and there are other issues there as well.

That's what the parties, I would say, contractually agreed to, right, concerning their relationship. It goes on over years, right. So the union gets together with the employer, they come up with -- every year they come up with different terms and conditions about how their arbitrations were going.

I think the FAA does promote that, meaning that they want to have -- people should have assurances that when they enter into a contract that the courts will, A, enforce that contract and abide by the terms of the parties, the two different parties agreed to.

THE COURT: Yes. I mean, listen, I'm not going to

resolve this today.

I do have to tell you I'm not sure I agree with your analysis of Agarunova, because I think there Judge Brodie basically was addressing whether the plaintiff was bound by ADR, an ADR provision that was implemented in a later agreement but didn't exist in any employment agreement or CBA at the time she was employed at the company. If anything, the arbitrability decision was delegated to the arbitrator.

So, really, I don't think it was for Judge Brodie to decide ultimately; but, again, I guess I just want to say that I think this is an issue that has -- that obviously I have to resolve, and I will hear more fully from the parties on that. Like I said, I don't think I can resolve it now, but I did want to point out that case because I think it may have some relevance to the discussion.

I don't know if you wanted to comment at all, Mr. Moser, but, again, I'm not going to resolve it today but I did want to note that decision because it appears close in terms of the facts and the issue addressed.

MR. MOSER: Thank you, judge. I just wanted to make one comment: That I anticipate that the union and Garda will both argue that they are no longer bound by this prior agreement and that their current agreement, the 2018 agreement, is the one that binds them and that, therefore, the arbitrator does not have the power to hear class and

collective actions. If that is the case, our position would be that the arbitrator does not have the power to hear this case.

THE COURT: Say that again. I'm sorry. You are now --

MR. MOSER: Yeah. So basically we have our client is not bound by the subsequent agreement. He filed a class and collective action.

The union and the employer, the parties to that subsequent agreement, are saying that any arbitrator that is selected cannot hear it on a class or collective basis. Therefore, the arbitrator does not have the authority to hear this class action.

THE COURT: Even if the class is defined as individuals who left the company before September 1, 2018?

MR. MOSER: Correct.

THE COURT: Oh, and then your view is that, well, you can always argue to the arbitrator that that's wrong, could you not?

MR. MOSER: We could, but the issue with regard to the FMCS, who is the arbitral forum, is they will not decide the arbitrability of any particular issue. That would be something that would left for the Court.

THE COURT: But the definition -- so I'm a little bit confused.

This is just speaking hypothetically. If I were to decide that this matter should go to arbitration, or that it's arbitrable, and you were before the arbitrator, your view is that the arbitrator could decide -- well, let me go back and say something further. Sorry. And if I also decided that the plaintiff in any class -- oh, I guess at that point the finding of the class, who would decide that? I guess not the arbitrator because the arbitrator can't entertain class actions, you would say.

MR. MOSER: Correct, and even if the Court at that moment would decide, based upon a limited class, and send it to the arbitrator, the arbitrator would not have the authority to hear it as a class under the current agreement between the employer and Garda.

THE COURT: Right.

MR. MOSER: And we believe that the union would argue against this in arbitration and say that, hey, he cannot bring any claims on a class or collective basis.

THE COURT: Well, this raises another question I wanted to ask both sides, perhaps more so to the defendant, whether or not this motion to compel arbitration is premature. Because it seems to me I could decide that the issue would be a class certified that is not governed by the 2018 CBA.

In other words, it seems conceivable that the class if it's defined -- rather, it seems conceivable that even if I

decide the 2018 CBA would apply or -- scratch that. I'm saying it all wrong.

If I decide that the 2018 CBA does not apply to the plaintiff or any class certified of employees who left the company before September 1, 2018, shouldn't -- wouldn't it be premature then to refer this to arbitration or to find that arbitration -- to decide a motion to compel arbitration because, just as Mr. Moser is pointing out, the arbitrator would take the position, as would the union, that he or she could not consider any class claims.

MR. FORREST: No, Your Honor; and I can explain to you why I think that is the case.

Part of the reason we were in settlement negotiations is partly because of this issue. These things have to work themselves out. So our position is straightforward and clear, that both CBAs, in the beginning part of those CBAs, have the same exact, identical arbitration clause.

We are certain that the claims are arbitrable, right, because if you look at either claim they are both arbitrable, right. It's the same exact, identical clause.

The clauses change as you go down, about what's going to happen in that arbitration, but whether the claims go to arbitration is still there. So it would have to wind itself out correctly, as it should, meaning let the system

work. So that Mr. Moser -- I'm sorry. Let me jump back.

We believe Your Honor should and would rule in favor of arbitration because, remember, the initial arbitration statements are the same. Then, if the -- then, if Mr. Moser is bringing his purported class action, which, again, as Your Honor correctly pointed out, should be correctly narrowed to just those people who the class could be, I don't know, that are people who worked for us, you know, from X -- it's really only 2016 because there is a statute of limitation of six years.

So it would be the people who worked for us from 2016, you know, that's six years from the date he filed this case, and left us before September of 2018. And then, after that, then if he brought that to the arbitrator and the arbitrator refused to hear those claims, then, I believe, he could come back to you and say, I believe that is an error; but the system has to work itself out because the arbitrator is there to decide these sorts of disputes, and that's the way it should work.

THE COURT: Let me back up here because there is a cluster of issues that are interrelated, but it seems to me there is some priority of deciding them because of the impact they have.

So your argument, Mr. Forrest, let's assume I don't find that the CBA provides for -- or rather, that arbitration

is permissive rather than mandatory under the CBA, because, as I said before, there are those three issues to decide. One is scope. So, loosely, arbitrability of the claim; and let's say I agree with you, because there is a clause in there that talks about claims based on federal, state, or local law.

So I don't think I'm revealing anything all that revelatory, but that seems to me to support your argument that the claims themselves could be subject to arbitration or come within the scope of the grievance in arbitration clause in both CBAs, whichever one applies.

MR. FORREST: Yes, Your Honor, but -- sorry, Your Honor, my apologies.

THE COURT: But then the other issue though that, I think, has some implication as to whether or not the class should be certified first or that class certification should be addressed first is whether or not the CBAs, both of which contain substantially the same language, require grievances to be arbitrated; and that's the part, I guess, of your motion to compel arbitration. And there, I will tell you, I'm not quite as sure, because the "shall" language that you cite -- and this is slightly different than the argument the plaintiff made in his letter -- to me, relates more to certain timing requirements.

So in Article 4C it basically says that the company shall have 14 days to respond to a grievance and then the

union shall have 14 days to request mediation or arbitration. Reading those together, it really suggests, pretty strongly to me, that the "shall" governs the amount of time proposed, but it doesn't necessarily require that arbitration or mediation be requested. I think you certainly would agree that you are not arguing that mediation must be requested.

The logical reading, to me at least, of 4C is that if you are going to request arbitration or mediation, the union, you have to do so within 14 days; and then, to me, that makes the other two sentences cited by both sides in 4C make more sense.

There is another sentence -- this may not be cited by either side -- but it says, Prior to actual submission to arbitration, a management-union meeting shall be scheduled. So, again, it makes this meeting mandatory; but, again, it doesn't say the arbitration is mandatory.

And then, the purpose of it is to attempt resolution of any disputes for which arbitration has been requested. Again, it doesn't say that arbitration must be requested. It suggests something more permissive. So, any claim for which arbitration has been requested.

Then there is this last sentence, which is discussed by the parties, if, after such management-union meeting or mediation, arbitration is still necessary because a legitimate issue about contract application remains open, then both the

company and the union shall -- but, again, this is they must then prepare a position statement. So it doesn't say that arbitration, again, is mandatory.

It suggests that, actually, if it's still necessary and so kind of counteracts the notion that it must happen, suggesting that somebody wants it to happen, then there is this shall provision about writing a statement. Again, the "shall" is always used in the context of what -- when it must be done or what must be provided if arbitration is requested.

I think it further suggests that there may be circumstances where arbitration isn't required because this clause is limited to issues remaining about contract application, not alleged violations of statutes.

So all I can say, again, to me -- and let me just say this, 4D also says the arbitrator shall be selected. But that doesn't mean you have to have an arbitration. It just means that the arbitrator's selection shall be from a list of seven people.

So I'm raising this because I want you to get some idea of how I'm doing this; but, again, it informs my question about whether or not it's premature to decide the issue of compelling arbitration versus class certification. I guess that question about class certification will depend on deciding which CBA applies, to me at least.

So again, there is a constellation of issues, but,

it seems to me, the prioritization depends on the impact of each of these issues on each other. So if I were, in my own mind, to prioritize them, it almost seems to me I have to decide which CBA controls because that may have an impact on whether or not a class can be certified and what it would look like.

And then, the other question is whether or not arbitration is compelled because of the provision of either CBA, because I think they are similar in that way, but whichever one governs.

So go ahead, Mr. Forrest.

MR. FORREST: Surely. Yes, Your Honor.

Well, I think, pursuant to the Second Circuit case cited by plaintiff, it's clear that if once we decide what is a grievance, right, so that's the first step. We have to decide what's a grievance; and here we have a very long explanation of what's a grievance. We talk about compensation, benefits, and hours; and, unlike the Second Circuit case cited by plaintiff, and unlike that case, we have the language here that says, or any other claim under federal, state, local law, statute.

So we are clear that statutory claims, like this New York Labor Law claims in this case, fall into what's a grievance. It's defined.

So then, once you go into -- once Your Honor can

decide and once the Court decides that it is a grievance, then we go to -- we would drop to B and C, as Your Honor just talked about. That's a common process, Your Honor; and I don't believe it is permissive meaning that it's a grievance because it shall be presented to the company.

And the thing that, I think, plaintiff is talking about as saying is permissive, that's not true. What's mandatory is that the response that mediation, quote-unquote, is mandatory, right, or at least the parties have an actual -- because it says prior to actual submission, prior to submission to arbitration.

So I would interpret 4C, I believe, slightly different than plaintiff's counsel because it's clear that before you arbitrate it says a union and a management meeting shall be scheduled in an attempt to resolve the dispute, right. So it's clear that it shall.

It says in the agreement to submit the grievance to mediation, shall stay arbitration until the mediation is held. So again, a "shall."

Then, they say, if such management -- if after such management-union mediation or arbitration is still necessary; and so all that is, Your Honor -- and it may not be worded exactly greatly, and I concede that to Your Honor, the Court, and to plaintiff -- it's setting forth a mediation process. And, I would say, it's setting forth a process much like the

Court has.

I know the Court --

THE COURT: Can we back up for a minute, Mr. Forrest?

MR. FORREST: Yes.

THE COURT: I have to stop you.

The second sentence of C says, If any response is deemed inadequate by the union, then the union shall have 14 days to request mediation or arbitration.

How does that sentence make arbitration mandatory, because it says mediation or arbitration? Is mediation mandatory?

MR. FORREST: Yes. I want to be clear that the union shall. The union has its time to decide if they want to go straight to mediation or arbitration.

THE COURT: Exactly. They have an amount of time to decide, but it doesn't mean they have to choose either, as opposed to go to court. That's what I'm trying to get at here.

The "shall" doesn't seem to modify at all clearly the requirement of arbitration or mediation. It just governs the time frame.

MR. FORREST: I would respectfully disagree. They only have those two choices. There is no other choice.

You can -- upon submission of the grievance to the

company, the union shall. The union has the time to either do mediation or arbitration. There is no other choice on there, and that's the union's choice. So whether you are looking at the earlier agreement or the 2018 agreement, the union has a choice, and they would probably be a necessary party to this now.

What's going on now is this. Nothing has been submitted. I think maybe we don't necessarily agree about some things, but it's a grievance, right; and then, there is a grievance and arbitration provision.

Once you get to the grievance and arbitration provision, almost every collective bargaining agreement has some period of, quote-unquote, you get to decide, you have to meet, you have to talk, if the parties don't disagree, then, if necessary, you go to arbitration; but that's it. You go to arbitration or you stick to a mediation; but you have to follow the CBA. You don't get to go to court here. There is nothing left here for that.

An agreement shall be submitted in writing. I think we can all agree that the provision in B has not been -- that no grievance has been presented by the union; and that hasn't been followed, and he was a unionized employee. So this provision is consistent with the agreement between the union and the employer, so that instead of just going straight to arbitration you have to sit down and you have to go straight

to arbitration or you go to mediation.

If you go to mediation, you attempt to resolve the dispute. If you don't resolve the dispute, that stays your time; and it says "shall stay" in the arbitration until the mediation.

So it's clear that it's not just the timing. There are obligations, I would respectfully state to the Court, about what you have to do once you decide and once I believe this Court would decide it's a grievance. Then the parties have to follow the grievance procedure and mechanisms, which is submit the grievance, which is the union decides if you get 14 days and then you decide if you are going to request mediation or arbitration. It doesn't say or Court. It doesn't say that.

And then, after that, you go forward with either mediation, arbitration, or, honestly, in many, many union and employer situations, resolution, right, settlement. That's also and always an option.

So I would respectfully say to the Court we have a grievance, as defined by Second Circuit law, right, for statutory claims. So Your Honor would, respectfully, have to let the process take place, and it's not appropriate at this time and, I believe, it would be premature at this time to decide -- for this Court to decide if there is any class or if a class can be presented.

The grievance should be presented. Then let the union and the employer work out this mediation schedule; and, if they can't, if Mr. Moser and his client don't agree, then and then only, only then can we get to this issue about a potential whether he could bring a class action claim in arbitration.

THE COURT: Let me ask you a question. If I decide that the 2017 CBA governs here, then the class could be certified of people who meet, who didn't -- who stopped working at the company before September 1, 2018, correct?

MR. FORREST: I think potentially, Your Honor, potentially. Potentially, yes, that is a potential to how people would think that would happen.

THE COURT: But if that happens, then --

MR. FORREST: But you don't -- but, Your Honor, I think, first of all, it would have to work its way through.

THE COURT: No, but that's my point. Again, I'm not deciding the class cert issue now because no one is moving for it; and that's my question.

If I decide the 2017 CBA governs, then the logical conclusion or inference is that a class can be certified of people like the plaintiff. That could define the class.

Then the problem becomes if I agree with you that arbitration is compelled under the 2017 CBA, then it seems like the parties are agreeing that the class claims cannot be

arbitrated -- although I'm curious on why Mr. Moser thinks that -- because, it seems to me, that if the 2017 CBA governs why can't the arbitrator decide class claims.

MR. MOSER: Well, Your Honor, let me just clarify.

To the extent that the Court feels or believes that the earlier CBA is the governing document and refers this to arbitration, there is nothing in that document which limits the scope of any class that can be certified, nothing.

The second CBA has a limitation on class arbitrations; and, under the second agreement, the arbitrator would not have the authority to decide it on a class and collective basis, but there is no prohibition under the first agreement for the arbitrator to decide this on a class and collective basis.

THE COURT: Right, and?

MR. MOSER: Regardless of -- because that's the governing document then.

THE COURT: Right. So what's the upshot?

If you end up in arbitration with a class action still intact, what are you going to argue to the arbitrator about the scope of that arbitrator's authority?

MR. MOSER: Well, I believe that, with regard to the scope of the arbitrator's authority, if we end up there, the scope of the arbitrator's authority is governed by that first agreement, which has no limitations whatsoever with regard to

class certification. But, respectfully, I don't think we get there here.

You know, when we look at a lot of other cases, the CBA has language that says arbitration is the sole and exclusive remedy; and that's in case after case after case after case.

If the parties wanted to make this the sole and exclusive remedy, we are talking about very sophisticated entities, you know, and that language is nowhere in this document.

MR. FORREST: Your Honor?

THE COURT: Let's go back for a minute. Your statement, though, that there is no limitation of who can be in the class under the 2017 CBA is correct, but I think it has no practical effect, though, if I decide that arbitration -- that the claim being made by this class has to be arbitrated, because then it seems like the 2018 agreement might prevent the arbitrator from arbitrating any class action claim.

MR. MOSER: That's the Catch-22 that we are in because, again, at this point neither the union nor the employer, I believe, will agree that the 2017 agreement is still and is the operative agreement here. So it's for the court to decide which agreement is operative.

To suggest that we can go to arbitration without knowing which agreement is the governing agreement, I would

respectfully disagree with that. To the extent the Court believes that one of these agreements is the governing agreement, it should be, you know, it has the power and it can tell the arbitrator which agreement governs.

It shouldn't be decided later on by the union and the employer.

THE COURT: I guess the only thing I'm not clear on is why it is you wouldn't argue or be able to argue to the arbitrator that if I decide that the 2017 CBA applies, at least to the claims of the class, why it is that the arbitrator couldn't decide those claims on a class basis, because with respect to those claims there isn't any, you know, preclusion of class actions for purposes of arbitration.

In other words, if you take the 2017 CBA in its entirety or apply it in its entirety, then the arbitrator isn't limited with respect to considering a class claim. Right?

MR. MOSER: I agree, Your Honor. I agree.

THE COURT: You could argue that to the arbitrator, and the arbitrator could agree or disagree.

MR. MOSER: Yes. However, I think that that's going to invite more litigation; and, I think, for the purposes of clarity in what -- to the extent that the Court believes it should proceed in arbitration, I think it behooves everybody to decide this now. Otherwise, we are going to be back before

you in six months arguing over whether or not the arbitrator exceeded the scope of his authority in either limiting a class or granting a class; and that's really at the heart of what we are talking about.

We are not necessarily talking only about the individual claims of the plaintiff. I don't think they concern the defendant that much. I think what concerns the defendant primarily is whether this will proceed on a class basis.

MR. FORREST: If I can respond to that, Your Honor?

THE COURT: Uh-huh.

MR. FORREST: Your Honor, I think what my client has at issue here and I think what the law is clear on is -- what the plaintiff seeks, I think, is reasonable, right, and I understand what the Court seeks is reasonable as well.

So that we are all on the same page, once you define the grievance to mean the way we define it, right, then it's an arbitration. Then the CBA controls. Then those steps must be followed.

The Federal Arbitration Act is clear that once you define something as a grievance, right, the parties are allowed -- sorry, a grievance that is arbitrable, the parties are allowed to say, okay, you know, we are going to meet.

And many, many, many collective bargaining agreements have this in there. I can brief that for Your

Honor. I will be happy to do that I will be happy to add that to my briefing.

Many, many collective bargaining agreements have an "if and" or "if that." But they are all clear that you still go to arbitration. Meaning your only choices are grievance. You submit the grievance, there is some cooling off time or some meeting time; and then, if the parties don't agree, you only have two options, which is -- I'm sorry, maybe three, or maybe, sorry, four. Let me put this clear because it's not as permissive as the plaintiff has propounded and the Court might think it is.

Those options are arbitration, one. Two, the mediation. Three, resolutions to the mediation, right, some settlement or some agreement. Or the party that bring said grievance, the party might drop it.

But one of those options is not court. One of those options is not some other dispute resolution mechanism that isn't provided for in the parties' collective bargaining agreement.

If nothing else, Your Honor, I would respectfully say this. Again, we believe that the most current agreement controls, because once you get to arbitration our agreement to go forward should control, meaning that even if parties have left us, like Mr. Collazos many years ago, if he brought his claim before 2018, when he left us, I would agree 100 percent

with plaintiff that, you know, if people are anything -- if he made a grievance within 14 days of August, of when he left, fine; but that's actually not the case.

When you sign to a union, it's different than a normal, everyday employee, right. When you sign on to a union agreement, the union controls your rights. The union negotiates on your behalf. That's what they do. Then the agreements change.

So to say that the current collective bargaining agreement doesn't control -- I'm sorry I'm going back to that issue -- would not be correct; but, more importantly, as to the issue of arbitration, I want to say this: The process has to work itself out. We can't all just litigate the whole thing right now.

So what would have to happen is he files a grievance. So Your Honor decides he has to go to arbitration. He files his grievance. We possibly sit through some mediation. If that's not successful, then it would go to the arbitrator. Then the arbitrator would make the decision.

Then Mr. Moser has a statutory right to claim that the arbitrator exceeded his authority or improperly would not allow him to proceed on his class action; and then he could come back to Your Honor. That would be the correct mechanisms that would be in place in this case.

THE COURT: So I don't want to go round and round on

these issues. Let me ask two questions.

Mr. Moser, do you agree with plaintiff's counsel that the claim, the New York Labor Law claims that are being made by plaintiff and the putative class, do fall within the definition of grievance? Is there any dispute about that?

MR. MOSER: No.

THE COURT: Under either CBA?

MR. MOSER: Correct.

THE COURT: Okay. So really the only issues, I think, would have to be briefed further or more fully, as the parties would like, is which CBA applies here, because that obviously governs whether a class action can be arbitrated; whether or not the requirements of arbitration is permissive or mandatory.

Obviously, Mr. Forrest, you have argued at length that there is no other option besides mediation, arbitration, or just some agreement or resolution; but that is key here, and I have already explained to you how I see the language itself in both CBAs being less than clear on this point. And you can argue as much as you would like on that particular point as well as -- oh, actually, really, there are only two issues, I think, because everyone agrees that the particular claims are covered by the grievance and arbitration clauses.

The only question is whether or not those clauses mandate or require, would limit the grievers or the employees

to mediation, arbitration, or some other negotiated resolution and preclude them from going to court. Then, the only other question is which of the CBAs applies, because that will have an impact on whether or not the claims can be brought as class claims.

I think also that the parties should address what the class would look like depending on which CBA applies. I'm a little perplexed, of course, by your argument that the plaintiff could be bound by the union negotiating the 2018 agreement when the plaintiff was not -- was no longer a member of the union and how it is that the union represented him in any way with respect to the negotiation of that new agreement.

I think the case law is not nearly as clear as you might suggest about the applicability of a new or superseding agreement when the plaintiff is complaining about things that occurred under a prior agreement and were subject to the terms of that prior agreement. So I do want to hear more about that issue.

MR. FORREST: Your Honor, I would just say this, Your Honor. There are a ton of class action cases in Southern District, in the Second Circuit, and the unions -- the union and the employers get together very often to class action waivers, or no class actions, and that covers that because --

THE COURT: Hang on. Does it cover people who are no longer members of the union and were not members of the

union at the time these new agreements were made, about past conduct?

MR. FORREST: Yes. I would pull that out. I have one now that was before, you know, because, look, New York has the longest statute of limitations probably in the country on the wage-and-hour claims, six years.

When an employer and a union get together, they do that to violate these. They do that so that going forward those claims are covered; and the exact reason they do that, because they have an interest in their members -- and their members, current and former members -- about the process. So someone --

THE COURT: Let me stop you.

How can a union be empowered to act on someone's behalf if they are no longer a member of that union, and what they are talking about existed under different terms when they were members of the union and the union had negotiated a different agreement on behalf of those workers?

Why is it fair that the union then decides something else to be negotiated and that should be applied retroactively to the person who is no longer supporting that union and who that union no longer represents?

MR. FORREST: Because they signed away their rights to the union, right. If you notice, Your Honor --

THE COURT: Who, the workers?

MR. FORREST: Yes. Sorry.

THE COURT: Okay.

MR. FORREST: The employees sign away their rights to the union. The union has the right to negotiate for them, to their detriment and to their benefit, sometimes giving away things at the bargaining table that the employees would never give away, sometimes even -- even, in rare cases, conceding statutes.

So sometimes, quite frankly, previous -- I have a case right now where previous collective bargaining agreements didn't cover a statutory wage-and-hour issue, right. Some of those employees who were in an agreement between the union and the employer had time that they weren't paid for, right; and the parties had agreed to that. The new agreement -- and there was litigation over it -- says that now you will be paid for stat time, and then those people in the past were actually compensated.

It can work to their benefit; it can work to their detriment. But the idea is the employer and the union are the legal entities bargaining; and when an employee signs onto the union, that's now my legal bargaining representative, and they are negotiating for any and all claims while I worked for them.

THE COURT: Statutory claims, though? The statute hasn't changed. So this is a right that vested back when it

occurred, and the right existed then.

You are saying that the union could later negotiate away the right of an employee, a former union member, to claim damages for past actions that at the time violated the CBA or -- or, actually, no violated the law. Forget about the CBA. The CBA doesn't define the violation.

So that worker had a right, by virtue of law that still exists, the New York Labor Law; and you are saying that the union could negotiate that away.

MR. FORREST: No, I'm not. No, not at all, Your Honor. I want to clarify.

Supreme Court precedent --

THE COURT: Just the right to arbitrate or not.

MR. FORREST: Yes. I just want to be clear.

Supreme Court precedent and Second Circuit precedent are all clear, when concerning class action waivers, all these other things, that Mr. Collazos and any and every union member still have the right to have their claims heard, just in a different forum.

So we are not extinguishing Mr. Collazos' or any individual union member's right to be paid. So if Mr. Collazos or any union member comes forth, they too can file a grievance and arbitration and be heard and have that claim adjudicated.

So, like, I would throw this out to Your Honor, even

in the collective bargaining agreement, both of them say something to the effect that the arbitrator shall not have the right to issue a back pay award of more than six months of pay; but then it says unless that's in violation of a statute, right.

THE COURT: You are right. Let me --

MR. FORREST: So they get their day in court --

THE COURT: Stop.

MR. FORREST: -- but it's just in a different tribunal than they would have preferred.

THE COURT: Stop, stop, stop. When I say stop, please stop.

MR. FORREST: My apologies.

THE COURT: Yes. You do tend to run on a bit and don't give me a chance to interject.

You are correct. I agree with you on that. I was focusing on the claim and the legal basis for it, not the forum, which you are arguing the union can bargain away in terms of how that can be pursued. I understand that.

MR. FORREST: That's all I'm saying.

THE COURT: Yes. I apologize for interrupting you, but I do need to stop you folks because I have another conference.

What we should do is set a date for the briefing. Like I said, the issues really that we should focus on are the

permissive versus mandatory nature of the arbitration requirement or the grievance and arbitration provisions; which agreement applies, which of the two CBAs applies; and then the impact of that decision on any class action or class that plaintiff may seek to certify at some point.

All right. How much time do you want to file your motion?

MR. FORREST: I might need a decent amount of time, Your Honor, only because November is a very bad month for me.

THE COURT: Okay.

MR. FORREST: I'm away the first part of December, and I know that bunches up against the holidays. So I think I just want to be fair to the plaintiff and the Court and probably --

THE COURT: Why don't you file the beginning of January. Does that work?

MR. FORREST: That would work for me, Your Honor, if Mr. Moser agrees.

THE COURT: Mr. Moser?

MR. MOSER: Of course.

THE COURT: Mr. Moser, any objection?

MR. MOSER: Of course. Not a problem.

THE COURT: Okay. So why don't -- let me grab a calendar. Why don't we have you file or -- I will explain in a moment -- serve your motion by January 7. Can you do that?

It's a Friday.

MR. FORREST: I think that seems fair, Your Honor. Yes.

THE COURT: Okay.

MR. FORREST: I'm sorry. Hello. I have a conflict on that day. Can I do the 11th, Your Honor? It's just the following Tuesday.

THE COURT: Okay. Not the 10th, the Monday?

MR. FORREST: Just the 11th, because it looks like there is something else on my calendar that Monday, and my time is blocked out and I can't see what it is.

THE COURT: All right. So January 11 for defendant's motion.

Do you want 30 days or more, Mr. Moser, to respond?

MR. MOSER: Thirty days will be sufficient.

THE COURT: Okay. So that takes us to February -- I will give you to February 4.

MR. MOSER: February 11.

THE COURT: No, February 8 is 30 -- February 10 is 30 days. So we will give you to February 11.

MR. MOSER: That's fine, Your Honor.

THE COURT: Okay. Then two weeks for a reply, if any. So that's February 25.

MR. FORREST: More than fair.

THE COURT: Okay. Now, as you may or may not know,

I do encourage what they call bundling, which means that, Mr. Forrest, you would simply serve Mr. Moser with your motion; Mr. Moser, you would simply serve Mr. Forrest with your opposition; and then, on the last date, which is February 25, both sides would file their respective submissions or pleadings.

The reason I do it is because we have some internal deadlines that are triggered by the filing of the motion. So if you follow this practice, it allows me to be more liberal about giving either side more time, because then you are not eating into my internal clock to decide.

But you do not have to follow that practice. Follow the Second Circuit. They say that you can do whatever you want, especially if you think are going to run afoul of some other statutory deadline.

The only thing I ask you to do is file your cover letter when you -- on the docket, when you serve your respective motion or opposition, so that we have a record that you complied with the timing or the scheduling. Okay?

MR. FORREST: That would be agreeable to defense counsel, Your Honor.

MR. MOSER: That's fine.

THE COURT: Okay. Good. All right.

Thank you both very much. I apologize for having to curtail this, but I do have another 12 o'clock criminal matter

that they are waiting for me on. So thank you very much. I appreciate both of your arguments.

Let me say one last thing. Mr. Forrest, even though I was pushing back on your interpretation of the mandatory nature of the CBA, obviously, I have been keeping an open mind, and your argument obviously has some force. I'm sure many courts would find or have found that similar language, you know, should be interpreted the way you suggest, that there are no other options than the two that are mentioned.

But I did want to at least give you some idea of how I think it also can be read. So you are on notice that you should address that potential interpretation.

MR. FORREST: Thank you, Your Honor, for giving me that. Thank you.

THE COURT: Yes.

MR. MOSER: One more -- I have one more question. I don't know if the Court has time.

THE COURT: Yes. Go ahead.

MR. MOSER: Very quickly. Arbitration is a creature of contract. To the extent that the employer in this case is going to argue that agreeing to arbitrate claims under the prior agreement is violative of their current agreement with the union, I would ask that they state as such so that's not raised at a later date.

MR. FORREST: I don't follow. I'm sorry.

THE COURT: Yes. I'm not sure I follow either.

I think defendant's position is plaintiff has to arbitrate his claim, and then any class claim would be precluded.

Am I correct, Mr. Forrest, that's your argument?

MR. FORREST: Yes, that is right.

MR. MOSER: Okay.

THE COURT: So I think, Mr. Moser, I don't think they are going to argue that you cannot arbitrate the claim or that somehow he cannot pursue his claim.

MR. MOSER: No, but to the extent the employer is going to say that they cannot arbitrate class claims under their current agreement, because it's violative of their agreement with the union, I just would respectfully request that that be set forth, if that's a position.

THE COURT: Oh, I'm sure that is their position.

Mr. Forrest, you would argue that no class claim can be brought before the arbitrator because of the 2018 CBA?

MR. FORREST: Yes, we would argue that, yes.

THE COURT: Yes. So that's already there. So you should address that obviously, both of you.

MR. FORREST: I think that will be part of the argument about which contract controls. We would set that forth separately.

THE COURT: What effect that would have on any class

that could be certified or not or whether a class can be certified; and, if one is, what does that mean?

If those claims, they are class claims and they can't be arbitrated, does that mean by default they can be brought before me; or, Mr. Forrest, will you argue they cannot be brought at all, which is, I think, really, the essence of your argument.

Maybe that's what you are getting at, Mr. Moser, that you would argue under -- well, that's an interesting question; and you should address it, Mr. Forrest.

Is it your client's position that because of the 2018 CBA about class action not being arbitrable and everything having to be arbitrated, does that mean no class claim can ever be brought by any employees?

MR. FORREST: Well, no. The agreement doesn't say that, Your Honor.

The agreement is clear that class claims -- that, first of all, individual claims can be brought; class claims can be brought, if Mr. Moser were to seek the approval of both the union and the employer.

THE COURT: Oh, okay, but --

MR. FORREST: The contract does not say class claims can't be brought. It does not say that.

It says the arbitrator doesn't have the authority to hear them, if they aren't approved by the union and the

employer.

THE COURT: I see. So wait a sec.

Class claims can be brought, if approved by the union -- well, sorry, they can be arbitrated if approved by the union and the employer, correct?

MR. FORREST: Yes. Hold on. I will pull up the exact thing, Your Honor. I'm sorry, Your Honor.

THE COURT: Yes. I'm looking at it as well.

Then the question is: If the employer and the union don't agree, can I assume an employee can bring their class action claim in court?

MR. FORREST: No.

THE COURT: So your position is that no class action claim in any forum unless it's arbitrated with the approval of the union and the employer?

MR. FORREST: Yes, that's right, because that would be consistent with, I think, even Supreme Court law, that even -- we don't have a class action waiver. So I want to differentiate between that.

THE COURT: Yes.

MR. FORREST: There needs to be approval for that, but the Supreme Court and Second Circuit are clear that class action waivers are actually enforceable because you are not saying you don't have a forum to litigate your claims.

We are just saying this is a forum you can litigate

it in and it has to be done this way. So that's it.

So, just real quickly, the arbitrator, the union --

THE COURT: No, no, no. Mr. Forrest, Mr. Forrest, save it for your written submission. Okay. Folks, save it for your written submission.

MR. FORREST: Okay.

THE COURT: Thank you. Thanks so much.

MR. FORREST: Okay.

MR. MOSER: Thank you.

THE COURT: Thank you both.

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Certified to be a true and accurate transcript.
/s/ Michele Nardone
MICHELE NARDONE, CSR -- Official Court Reporter